No. 11139

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COMMERCIAL CASUALTY INSURANCE COMPANY, a New Jersey corporation, *Appellant*,

vs.

LESLIE O. FOWLES, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANT

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I.

STATEMENT OF THE CASE

1. The Parties

The action was brought in the court below by Leslie O. Fowles, who will be referred to as the plaintiff or appellee, against the Commercial Casualty Insurance Company, who will be referred to as the defendant or appellant. The action was brought under the provisions of Section 274d of the Judicial Code, 28 U.S.C.A., Section 400.

2. Statement of Facts and Issues of the Case

On or about the 4th day of May, 1937, the plain-

tiff was issued an accident insurance policy by the defendant company. The said policy was issued after an application therefor had been made to the defendant company wherein the plaintiff listed his occupation as that of a mail carrier on foot in the City of Olympia, Washington. The application setting forth the occupation of the plaintiff was attached to and made a part of the accident insurance policy. By the terms of the policy the defendant company was to pay to the plaintiff the sum of $25.00 per week and certain hospital benefits, in the event that the plaintiff was accidentally injured during the life of the policy. There was a further provision in the contract of insurance covering a change of occupation and referring to the defendant's classification of risks, which provision provided that in the event of a change of occupation, the insured could recover only the amount which the premium paid would have bought in the more hazardous occupation. The plaintiff, at the time the policy was taken out, was a member of the Washington National Guard, though this fact was not called to the attention of the insuring company. On or about the 3rd of February, 1941, the plaintiff was mobilized into the Army of the United States with the rank of captain and he subsequently became a lieutenant colonel. On or about the 14th of April, 1943, the plaintiff was injured while driving a motor vehicle in the City of Philadephia and he subsequently brought the present action claiming total disability from the time of the said accident and alleging that he should be paid the full indemnity set forth in the policy, namely, $25.00 per week, plus

certain hospital bills. The plaintiff's original complaint was filed in court on October 11, 1944, and merely prayed that the plaintiff be given the weekly indemnity set forth in the policy plus his hospital and nursing expenses and prayed judgment in the total sum of $2,100.00. The defendant by its attorneys made a motion to quash the summons and service thereof and supported this motion by an affidavit. Thereafter on the 16th day of January, 1945, the plaintiff filed an amended complaint wherein he pleaded that there was due him the sum of $2,575.00 and further alleged that the future rights of the plaintiff had a value in excess of $3,000.00. The defendant moved to quash the amended complaint and service thereof on the ground that the jurisdictional amount was not involved and that this fact appeared on the face of the complaint. This motion was based on the affidavit of William J. Madden. The motion, which the court considered as a motion to dismiss, was argued to the court and the Honorable L. B. Schwellenbach, Judge of the District Court of the United States for the Eastern District of Washington, overruled the defendant's motion by a memorandum opinion dated April 2, 1945. This memorandum opinion is found on page 39 of the Transcript of Record. An order overruling the Motion to Dismiss was entered on the 11th day of April, 1945.

Thereafter the defendant answered the complaint alleging that the jurisdictional amount necessary for a Federal Court action was not involved and further setting up the defense that the plaintiff had changed his occupation to one more hazardous than that set

forth in his application, without notification to the defendant company, and alleging that by virtue of such change the plaintiff was entitled to a weekly indemnity not to exceed $5.00. This for the reason that a mail carrier on foot is listed in the company's classification of risks as Class B, whereas a commissioned officer in the Army or Navy is listed as Class K, and that the highest policy that the company would write in any event on a person listed in Class K would be in the principal sum of $500.00 and weekly indemnity not to exceed $5.00.

The case was tried before the Honorable L. B. Schwellenbach without a jury on the 15th of June, 1945. The defendant company admitted that the policy in question was in full force and effect and stipulated that the plaintiff was totally incapacitated up to the time of the trial, but denied that the incapacity was permanent. No question was raised as to the validity of the policy. The court found in favor of the plaintiff for the full amount claimed on the basis of the decision in the case of *Nordin v. Commercial Casualty Insurance Co.*, 176 Wash. 59, holding that in view thereof that it was unnecessary to pass upon the question of alleged change of occupation.

Thereafter Findings of Fact and Conclusions of Law and a Judgment were signed by the court, calling for the payment of $112.50 as hospital indemnity and for a further payment of $25.00 per week from April 21, 1943, for the period of total disability to the plaintiff. Thereafter a motion for a new trial was made by the defendant and overruled by the court and notice of appeal was filed on the 25th of July,

1945, and all steps necessary to effect an appeal were taken.

3. Points to Be Relied Upon

In writing the brief and correlating the law on the various points which the appellant wishes to bring to the attention of the Circuit Court of Appeals, it has been found that some of the points set forth in the appellant's statement of points as contained in the Transcript of Record on page 81, necessarily merge and are discussed in each other. The appellant will therefore discuss the points to be relied upon under the following headings.

1. The jurisdictional amount of $3000.00, exclusive of interest and costs was not involved.

2. Jurisdiction depends on facts alleged when suit is commenced and cannot be changed by later amendments.

3. The lower court was in error in calculating future speculative damages which had not yet accrued and using these speculative damages as a basis for holding that the required jurisdictional amount was involved.

4. The lower court was in error in basing its findings on the life expectancy of the plaintiff.

5. Remington's Revised Statutes of Washington, Section 7233, have been complied with by the defendant company and the district court was in error in deciding the case in favor of the plaintiff, on the ground that the defendant had failed to file proper classification of risks.

II.
ARGUMENT

1. There Was Not $3000.00, Exclusive of Interest and Costs, in Controversy When Suit Was Commenced.

The Declaratory Judgment Act, under which this suit was instituted, does not create any new right. Under the Declaratory Judgment Act, the necessary jurisdictional amount of $3000.00 is still required and it has been held with uniformity by the courts that before a declaratory judgment is issued there must be an actual controversy between the parties, which is a justiciable one, involving more than $3000.00, exclusive of interest and costs.

The court in *Mutual Life Insurance Co. of New York v. Temple*, 56 F. Supp. 737, said as follows:

> "The Federal Declaratory Judgment Act is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the Federal courts already have jurisdiction. * * *" (page 742)

As has been pointed out, the only controversy in the present case was the factual one of whether or not the plaintiff had changed his occupation so as to diminish the weekly payment called for under the policy. It might be noted again that not only was there not $3000.00 involved at the commencement of the suit but at the time judgment was entered, several months after the commencement there was still less than $3000.00 involved, exclusive of interest and costs.

One of the early leading cases which construed the monetary requirements for jurisdiction in the

Federal Court, which case has not been overruled, is *Elgin v. Marshall*, 106 U.S. 578, 1 S. Ct. 488, 27 L. ed. 249. That was a suit upon coupons of a value less than was required to confer jurisdiction, but its decision necessarily involved the validity of bonds from which the coupons had been detached, the value of which bonds was sufficient to give jurisdiction. It was dismissed for want of jurisdiction and the case has been followed by the Supreme Court in many leading subsequent cases.

Opelika City v. Daniel, 109 U.S. 108, 3 S. Ct. 70, 27 L. ed. 873;

Gibson v. Shufelt, 122 U.S. 27, 7 S. Ct. 1066, 30 L. ed. 1083;

Vicksburg, etc. R. R. Co. v. Smith, 135 U.S. 195, 10 S. Ct. 728, 34 L. ed. 95;

The Sydney, 139 U.S. 331, 11 S. Ct. 620, 35 L. ed. 177;

New England Mortgage Co. v. Gay, 145 U.S. 123, 12 S. Ct. 815, 36 L. ed. 646 (117, 118).

The court in the case of *Elgin v. Marshall* at page 580 says:

"* * * The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. *Lee v. Lee*, 8 Pet. 44; *Barry v. Mercein*, 5 How. 103; *Pratt v. Fitzhugh*, 1 Black, 271; *Sparrow v. Strong*, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of

parties, but must be given by the law, so it ought not to be extended by doubtful constructions.

"Undoubtedly, Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. *Williamson v. Kincaid*, 4 Dall. 20; *Course v. Stead*, id. 22; *United States v. Brig Union*, 4 Cranch, 216. But the fact of value in excess of the limit must affirmatively appear in the record, as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case, unless its right and duty to do so are apparent upon the face of this record.

"The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the stat-

> ute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. * * *"

Another important United States Supreme Court case reaching the same conclusion as the *Elgin* case was that of *New England Mortgage Co. v. Gay*, 145 U.S. 123, 12 S. Ct. 815, 36 L. ed. 646, wherein there was a suit for the amount due as interest on a mortgage. The sum in dispute was under the jurisdictional amount but there was interposed a defense of usury, which if sustained, under Georgia law, would invalidate the mortgagee's title and raise the question as to the validity of the whole loan, which loan was far in excess of the amount necessary to confer jurisdiction. The court held that the latter was a collateral matter which did not give jurisdiction to the court and that the actual amount involved in the suit was controlling.

The case of *Gibson v. Shufeld*, 122 U.S. 27, 7 S. Ct. 1066, 30 L. ed. 1083, reviewed all the early cases on this subject, holding that the court's jurisdiction was determined by the amount actually in controversy.

Perhaps the leading modern Circuit Court case involving the required jurisdictional amount, and one which is closely akin to the case here being considered by the court, is that of *Mutual Life Insurance Co. of New York v. Moyle* (C.C.A. 4) 116 F.2d 434. In the *Moyle* case, the insured had a policy which provided $20,000.00 in death benefits and disability payments of $200.00 per month. The insured made a claim for total and permanent disability and the claim was paid for a number of months. The policy also in-

volved a waiver of the premium during the period of disability. The Insurance Company thereafter refused to continue payment and alleged that the insured was no longer totally and permanently disabled within the meaning of the policy and insisted that the insured make payments to keep the policy in force. The insured contested these allegations. A declaratory judgment action was brought by the Insurance Company in the Federal Court to determine the rights of the parties and at the time the action was commenced there was due the insured under the disability provision of the policy less than the jurisdictional amount. It might be noted that the instant case and the *Moyle* case are virtually identical, the only difference being that in the *Moyle* case the question of fact was as to whether the disability continued to exit, giving the insured the right to collect the $200.00 per month, while in the instant case the question of fact was as to whether there had been a change of occupation, which would cut the insured's right to collect $25.00 per month down to a lesser sum. It is noteworthy that in the *Moyle* case the court clearly pointed out the fact that no controversy existed as to the validity of the policy nor as to its meaning. The court in its decision on page 435 makes the following statement:

> "No controversy is alleged to exist as to the validity of the policies, but, on the contrary, plaintiff itself avers that they are valid obligations and are in full force and effect. Nor is there any controversy as to the meaning of the policies. They are attached to the complaint and plainly provide that, when it shall appear that the in-

sured is no longer totally disabled, no further disability payments will be made or premiums waived. The contention that the jurisdictional amount is involved is based upon the fact that the life expectancy of the insured exceeds the period of 16 months, for which the disability payments would exceed the sum of $3,000, and that plaintiff under the laws of the State of New York is required to set up and carry, and does set up and carry, a reserve exceeding $3,000 against insured's claim.

"We think it clear that all that is in controversy is the right of the insured to the disability payments which had accrued at the time of suit. The company is obligated to make these payments only so long as the condition evidencing total and permanent disability continues; and, as this condition, theoretically, at least, may change at any time, it is impossible to say that any controversy exists as to any disability payments except such as have accrued. *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 56 S. Ct. 615, 80 L. ed. 971; *New York Life Ins. Co. v. Stoner*, 8 Cir., 92 F. 2d 845; *United States Fidelity & Guaranty Co. v. McCarthy*, 8 Cir., 33 F.2d 7, 13, 70 A.L.R. 1447; *Metropolitan Life Ins. Co. v. Hobeika*, D.C., 23 F. Supp. 1; *Small v. New York Life Ins. Co.*, D.C., 18 F. Supp. 820. Such a case is to be distinguished from one where the controversy relates to the validity of the policy and not merely to liability for benefits accrued; for, in the latter case, the amount involved is necessarily the face of the policy in addition to the amount of such benefits. See *Stephenson v. Equitable Assur. Soc.*, 4 Cir., 92 F.2d 406; *Bell v. Philadelphia Life Ins. Co.*, 4 Cir., 78 F.2d 322; *Pacific Mutual Life Ins. Co. v. Parker*, 4 Cir., 71 F.2d 872.

> "It is well settled that, in a suit by the insured to recover disability benefits under policies such as we have here the amount involved for purposes of jurisdiction is the amount of the disability benefits for which suit is brought. *Equitable Life Assur. Soc. v. Wilson*, 9 Cir., 81 F.2d 657. And this is true, although the probative effect of the judgment may be to establish the right of the insured to recover sums far in excess of the jurisdictional amount. Indeed the rule is applied with respect to suits to recover instalments of interest on bonds, where the recovery may be absolutely determinative of the right to recover in future cases. *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 12 S. Ct. 815, 816, 36 L. ed. 646. In the case last cited the court said: 'It is well settled in this court that, when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur * * *'."

The substance of the court holdings in the *Moyle* case was that where an action for declaratory relief is brought and the total amount of disability payments due to the insured when the complaint is filed is less than the jurisdictional amount and there is no controversy as the validity of the meaning of the policy, the action is properly dismissed, despite the fact that the insured had a life expectancy of a period for which the disability payments would exceed the required jurisdictional sum, since the jurisdictional amount cannot be predicated on speculation as to what may accrue to the insured in the future.

In *Wright v. Mutual Life Insurance Co. of N. Y.*, 19 F.2d 117, the court said:

> "We are of the opinion that the trial court did not have jurisdiction of the subject matter and therefore erred in denying the appellant's motion to remand the case to the State court. 'The matter in controversy' was the amount for which the appellant could recover judgment, that amount which could not exceed $420.00, was much less than is required to confer jurisdiction on a Federal District Court. It is true that in the action the question was involved whether appellee was liable for double indemnity on past due installments and that a decision on that question would work an estoppel as to liability on future installments of an aggregate amount which would exceed the jurisdictional amount of $3000.00."
>
> *Cromwell v. County of Sac.*, 94 U.S. 351, 24 L. ed. 195.
>
> "But the collateral effect of a judgment is not the test of jurisdiction, * * *."

The court then went on to cite the case of *Elgin v. Marshall* and others we have mentioned above herein.

The *Wright* case was sustained by the Supreme Court of the United States in *Mutual Life Insurance Co. of New York v. Wright*, 276 U.S. 602, 48 S. Ct. 373, 72 L. ed. 726.

Another case which is pertinent to the set of facts under consideration here is *Button v. Mutual Life Insurance Co. of New York*, 48 F. Supp. 168. The court in that case on page 171 stated:

> "The matter in controversy involves only the liability of the insurance company to make the

payments already accrued. No controversy exists in this action as to any disability payments under the contract in the future. The insurance company may or may not decline to pay them, and the facts occurring subsequent to the filing of this action may completely justify its refusal to make future monthly payments even though the result of this action obligates it to pay those already accrued; such subsequently occurring facts might lead the insurance company to make such payments in the future irrespective of the result of this action. This action is in no way res judicata as to its liability under the policy in the future. Although the effect of the judgment in this case may result in the insured collecting from the insurance company a total sum far in excess of the jurisdictional amount, yet it is well settled that when federal jurisdiction depends upon the amount in controversy, 'it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur.' *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 12 S. Ct. 815, 816, 36 L. ed. 646. The collateral effect of a judgment is not the test of jurisdiction. *Troy v. Evans*, *supra*, 97 U.S. 1, 24 L. ed. 941; *Town of Elgin v. Marshall*, *supra*, 106 U.S. 578, 1 S. Ct. 484, 27 L. ed. 249; *New Jersey Zinc Co. v. Trotter*, 108 U.S. 564, 2 S. Ct. 875, 27 L. ed. 828; *City of Opelika City v. Daniel*, 109 U.S. 108, 3 S. Ct. 70, 27 L. ed. 873; *Bruce v. Manchester & K.R.R.*, 117 U.S. 514, 6 S. Ct. 849, 29 L. ed. 990."

The Ninth Circuit Court of Appeals in the case of

Equitable Life Assurance Society of United States v. Wilson, 81 F.2d 657, held that in an action to recover $750.00 as monthly disability payments already due under a $2500.00 life insurance policy covering total permanent disability the jurisdictional amount could not be attained by adding the face of the policy to such payments, even though the insurance company's answer alleged the lapse of the policy for non-payment of premiums prior to the disability, and therefore the total value of the policy in issue. The court in its decision said as follows:

> "The claim cannot prevail. The Supreme Court has decided that, in an action at law in which the controversy is for a sum less than the jurisdictional amount, the fact that the proof that the lesser sum was not then due involved the invalidity of a contract for a larger sum in excess of $3000.00 but not then sued for does not create a controversy in excess of $3000.00."

The court then went on to cite with approval many of the cases which have been quoted herein and distinquished cases cited by the trial court in its memorandum opinion denying the appellant's motion to dismiss.

The foregoing citations could be multiplied but sufficient cases have been set forth to indicate with clarity that the law is well settled to the effect that in an action to recover disability benefits under a policy such as is here in suit, the jurisdictional amount must be measured by the payment which have already accrued, regardless of the fact that the collateral effect of the judgment may establish a right in the in-

sured to recover sums which eventually will exceed the jurisdictional amount. The Federal courts will entertain a suit on such policies where the jurisdictional amount has not yet accrued only where the validity of the whole policy is in issue and the policy value exceeds the jurisdictional amount. Such is the import of the only cases which have been cited by the plaintiff in the lower court in defense of his bringing the action in a Federal rather than State court.

As has been pointed out above, the present case is one where the company, far from denying the validity of the policy, at all times has alleged it to be in full force and effect and has offered to make proper payments thereunder to the plaintiff. In the trial of the case, the company did not even contest the total disability of the plaintiff at the time the action was brought, but on the contrary stipulated that the point would not be raised. The only point which was litigated by the defendant was the factual one of whether or not the plaintiff had changed his occupation without notification to the company. By no stretch of the imagination could it be called a denial of the validity of the policy or even a fact which called for the construction of any of the terms of the policy.

The plaintiff has not alleged or contended that the clause in the policy in reference to change of occupation and calling for notification in case of such change was invalid and the plaintiff has, on the contrary; steadfastly maintained that he did not change his occupation contrary to the policy provisions. It follows therefore that this was the only controverted fact in the case.

It has already been decided by several of the Circuit courts, in cases cited above, that the denial by the company that the policy holder had suffered disability entitling him to collect did not raise a question as to the validity of the policy, entitling the party to bring suit in the Federal Court, if the overdue payments did not exceed jurisdictional amount. It would seem to follow equally clearly that merely raising the question as to whether or not a policy holder had changed his occupation prior to receiving the injury for which redress is sought would also in no way be deemed to be an attack upon the validity of the policy. The judge of the lower court in overruling the defendant's motion to dismiss and sustaining the right of the plaintiff to bring this action in the Federal Court rested his decision on the case of *American General Insurance Co. v. Boose*, 146 F.2d 329.

It is respectfully submitted that the cited case is not in point. This case was one where there was an automobile accident and the insurer of the defendant brought an action in the Federal Court to have a declaration of its non-liability under the policy made, in a suit which had been brought by the appellant against the appellees. One of the persons injured in the automobile accident subsequently died and suit was brought for $25,000.00. The contention of the litigant who brought the declaratory judgment action was that, inasmuch as there was no certainty that more than $3000.00 would be obtained, that the case should therefore be dismissed. Obviously this contention was ill founded in that there is no certainty in any case that the plaintiff will recover anything and if such

were the test no case could ever be brought in a Federal court.

It is respectfully submitted, however, that the *Boose* case sets forth an entirely different set of facts than the instant one where it appears from the face of the complaint that if the plaintiff recovered everything for which he prays he could not possibly obtain a judgment for the jurisdictional amount, exclusive of interest and costs.

2. Jurisdiction Depends on Facts Alleged When Suit is Commenced and Cannot Be Changed By Later Amendments.

Regardless of what the rule may be in other situations, it has been uniformly held that federal jurisdiction, as regards the amount involved, is determined by the facts before the court when the suit is commenced and any deficiencies cannot be cured by later amendments. We respectfully refer the court to the following language from the case of *Ford, Bacon & Davis, Inc. v. Volentine*, 64 F.2d 800:

> "Federal jurisdiction depends on the facts at the time suit is commenced, and subsequent changes neither confer not devest it. This is well settled as to diversity of citizenship."

Other cases reaching the same result are:

Mutual Life Insurance Co. v. Rose, 294 Fed. 122;

Cohn v. Cities Service Co., 45 F.2d 687.

Another Federal case held that the right to inter-

vene presupposes action duly brought, and if jurisdiction is lacking at the commencement of the suit, because the amount involved is insufficient, it cannot be aided by intervention of a creditor with a sufficient claim. *Pianta v. H. M. Reich Co.*, 77 F.2d 888.

It has further been determined that the amount of value of the right in dispute cannot be augmented for jurisdictional purposes by the collateral effect a judgment in the case will produce. *Elliott v. Empire Natural Gas Co.*, 4 F.2d 493, *Scarborough v. Mountain States Telephone Co.*, 45 F. Supp. 176.

The Circuit Court of Appeals for the second circuit in deciding the case which came before them in 1930, gave a succinct statement of the general rule that the question of jurisdiction must be determined from the original complaint, in using the following language:

> "Cohn's bill would not give jurisdiction to the district court, and certainly alone would have been dismissed, because the subject matter in dispute was not of the value of $3000.00. It is true that it contained general allegations to the contrary, but, when a bill carries its own contradiction on its face, that is not conclusive." (Citing cases)

Cohn v. Cities Service Co., 45 F.2d 687.

Even if the objection that the amount in controversy was insufficient to sustain the jurisdiction of the Federal Court, was not raised, it is the duty of the court to dismiss of its own motion, if the cause was not within its jurisdiction. *Lion Bonding Co. v. Koratz*, 280 Fed. 532.

3. The Lower Court Was in Error in Calculating Future Speculative Damages Which Had Not Yet Accrued and Using These Speculative Damages As a Basis for Holding That the Required Jurisdictional Amount Was Involved.

Many of the citations contained in Section I of the appellant's argument also are authority for the contention of the appellant as set forth under this heading. There were in addition many other Federal cases which specifically emphasized that in a suit to recover periodic payments due to the plaintiff under the terms of an accident insurance policy that only those payments may be recovered which are due at the commencement of the action and that, inasmuch as the situation may change at any time by the death or recovery of the plaintiff that the court will not speculate as to the amount or value of payments which have not yet accrued.

Reuter v. Pacific Mutual Life Insurance Co., 43 P.2d 576;

Cobb v. Pacific Mutual Life Insurance Co., 40 P.2d 574;

Parks v. Maryland Casualty Co., 59 F.2d 736.

In the case of *Mobley v. New York Life Insurance Co.*, 74 F.2d 588, the court in holding that suit could not be maintained for unmatured payments due under an accident or life insurance policy went so far as to use the following language:

> "Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that the company misjudged its ob-

> ligations. Such an error made in good faith whether founded in mistake of law or fact is not repudiation, and does not end a continuing contract, but calls only for enforcement according to its terms. * * *"

In this particular connection the appellant takes the liberty of repeating again the following language from *Mutual Life Insurance Co. of New York v. Moyle*, 116 F.2d 434:

> "We think it clear that all that is in controversy is the right of the insured to the disability payments which had accrued at the time of suit. The company is obligated to make these payments only so long as the condition evidencing total and permanent disability continues; and, as this condition, theoretically at least, may change at any time, it is impossible to say that any controversy exists as to any disability payments except such as have accrued. * * *"

4. The Lower Court Was in Error in Basing Its Findings On the Life Expectancy of the Plaintiff.

The defendant submits that it is so fundamental as not to require citation that the life expectancy of the plaintiff could not be used as a basis for computing the damages or in holding that the court had jurisdiction, when no evidence of the said life expectancy was produced or offered at the trial of the case.

Even had there been competent evidence produced as to life expectancy of the plaintiff, it is respectfully submitted that the courts have frequently reaffirmed the fact that in suits on accident policies, such as is being considered in the instant case, that the life expectancy of the plaintiff cannot be used as a basis

for calculating damages which have not yet and may never accrue. In the case of *Travelers Insurance Co. v. Wechsler*, 34 F. Supp. 721, the court set forth the following on page 723:

> "In the absence of a showing or effort to cancel the policies as in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. ed. 617, 108 A.L.R. 1000, or in the absence of allegations of lapse of policies by the failure to pay premiums or in the absence of admission of total and permanent disability, but in denial thereof, it is difficult to see how the life expectancy of the assured, multiplied by the yearly disability benefits contained in the policy, or the reserve to be maintained under the policies, could either be computed to supply the requisite amount in controversy."

In the case of *Mitchell v. Mutual Life Insurance Co. of N. Y.*, 31 F. Supp. 441, the following language is used, relative to the ability of the plaintiff to plead future potential payments, not yet accrued in order to establish the jurisdictional amount, necessary for the entertaining of the suit by the Federal Court.

> "If the plaintiff be determined by trial to be totally and permanently disabled, he will be entitled to money judgment for six months at $30.00 per month or the sum of $180.00. We are computing to the date of filing of suit, December 7, 1939, which is the date on which jurisdiction is to be ascertained. Payments in the future during total and permanent disability are not to be considered in establishing jurisdiction. *Wright v. Mutual Life Insurance Co.*, 5 Cir., 19 F.2d 117; *Mutual Life Insurance Co. of N. Y. v. Wright*, 276 U.S. 602, 48 S. Ct. 323, 72 L. ed.

726; *Elgin v. Marshall*, 106 U.S. 578, 1 S. Ct. 484, 27 L. ed. 249; *Small v. N. Y. Life Insurance Co.*, 18 F. Supp. 820."

Other cases reaching the same result and denying the right to add future payments, not yet accrued, in order to establish a jurisdictional amount are:

Parks v. Maryland, 59 F.2d 736;

Mobley v. N. Y. Life Insurance Co., 74 F.2d 588.

The case of *Mutual Life Insurance Co. of N. Y. v. Moyle* cited above further holds that the life expectancy of the plaintiff is not an element which can be used as a basis for computing future speculative installments on an accident policy such as is here in question and using this speculative amount to confer jurisdiction on a Federal Court.

5. The Requirements of Remington's Revised Statutes of Washington, Section 7233, Have Been Complied With by the Defendant Company and the District Court Was in Error in Deciding the Case in Favor of the Plaintiff, on the Ground That the Defendant Had Failed to File Proper Classification of Risks.

The lower court did not pass upon the substantial issue presented in the case, namely, as to whether or not the plaintiff had changed his occupation, but decided the case in favor of the plaintiff on the ground that the defendant had not complied with Section 7233 of Remington's Revised Statutes of Washington. This section deals with the requirement that insurance companies writing health and accident policies file with the Commissioner of Insurance a form of each

policy that they issue and a schedule of rates and the classification of risks affecting said policies.

Most states have a statute similar to the one referred to and its obvious purpose is two-fold. Primarily, it is for the purpose of calling to the attention of the Insurance Commissioner any new policy issued in the State so that the Commissioner will have the opportunity to pass upon it and, secondly, it is for the purpose of having information on file with the Commissioner, whereby any interested person may ascertain what his rights are under any policy which is issued in the State. It is not the purpose of the statute to encumber the records of the Insurance Commissioner's office with a duplicate of identical material on each and every occasion that an insurance company makes a trivial change in an existing policy or issues a new policy containing slightly altered provisions.

The evidence indicates that the defendant company wrote several accident policies, the principal difference being that one type of policy, such as the one here in suit, was issued only to preferred risks or to people who were engaged in less hazardous occupations. The other policy would be written with substantially the same provisions but with reduced indemnities, for people whose occupations were considered to be more hazardous. The premium rates and the policy provisions would differ, but the classification of risks was the same in each case, in that the classification or risks was merely a list of different occupations, to each of which was appended a symbol or letter so that the degree of hazard attached to any

occupation could be quickly ascertained by referring to the classification manual. Not only did the defendant company have but one classification of risks but virtually all of the companies writing this type of insurance classified the risks in the same manner.

The policy in suit was issued to the plaintiff on the 4th day of May, 1937. As is indicated by the testimony of Lee I. Kuelchelahn, found on page 101 of the Transcript of Record, the original classification of risks filed by the defendant company was received in the insurance commissioner's office on May 29, 1929. The Star Accident Insurance Policy was filed on June 3, 1931, and thereafter the defendant company filed a later manual on October 1, 1932. The later manual, which is referred to in the evidence as the red manual, is defendant's exhibit I. Due to its bulk, it was not printed in the Transcript of Record but was attached thereto. It should be noted that the classifications of mail carrier and army officer are not changed in the red manual.

The so-called red manual filed in 1932 superseded the prior manual and referred to all of the policies which the company then issued in the State of Washington.

The court in rendering its oral decision, a part of which is contained on the bottom of page 123 of the Transcript of Record, quoted Remington's Revised Statutes of Washington, Section 7233, as follows:

> "Rem. Rev. Stat., Sec. 7233, provides that no accident insurance policy shall be issued or delivered until a copy of the form thereof and of the classification of risks pertaining thereto

have been filed with the Insurance Commissioner."

The court in quoting this section left out the following language contained in the statute.

"If more than one class of risks is written."

The evidence clearly indicates that the defendant company writes only one class of risks which classification is set forth in the red manual.

In the case of *Nordin v. Commercial Casualty Ins. Co.*, 176 Wash. 59, it appears that the classification of risks which had been filed referred directly to one policy form 2H, which policy was not in evidence in the case, and, due to its absence the court was not in a position to ascertain whether there was such a similarity between the policy to which the classification of risks applied and the one in suit so as to be able to determine whether the classification should be interpreted to extend to the later. In the *Nordin* case, the court merely holds that inasmuch as the classification of risks applied to a specific policy, they could not assume that that policy and one in suit were the same. In the case now before the court the classification of risks filed in 1932 and referred to as the red manual, was the only classification filed by the company and applied to all of its underwriting. In addition thereto the company filed a specimen Star Accident Policy and also filed the premium rates of the Star Accident Policy, which rates, as filed with the Commissioner of Insurance, were introduced as evidence in this case and are set forth under Defendant's Exhibit No. II on page 129 of the Transcript of Record.

If the court's contention is to be upheld, the defendant would be obliged to do the repititous act of filing the same manual a number of times and having imprinted thereon that each manual applied to different policies, despite the fact that the manual of risks in each case would be identical. The contention is, that the company is in error and must forfeit its rights because it filed only one copy of its manual whereas if it writes twenty different policies containing immaterial variations, it would have preserved its right by filing twenty copies of the same classifications of risks.

It might be held that the requirements of the *Nordin* case cited above or of Remington's Revised Statutes of Washington, Section 7233, have not been complied with if the company had on file several different classifications of risks and several different policies, the classification of risks not specifically applying to any particular policy. In such case there would be a reasonable confusion in determining what classification of risks applied to what policy. In the instant case, however, where there is only one classification of risks, there can be no doubt or confusion but that it applies to each policy filed by the company.

The policy issued by the defendant under its change of occupation clause set forth on page 32 of the Transcript of Record contains the following language.

> "If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having super-

vision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the company's rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the company is liable."

It should be further noted that the filing of the classification of risks and premium rates and policy had been made by the defendant company to the satisfaction of the insurance commissioner of the state.

CONCLUSION

Having in mind the fact that the Declaratory Judgment Act does not in any way enlarge or change the monetary jurisdictional requirements of the Federal Courts and it appearing as an undisputed fact from both the pleadings and evidence that the only elements which were contested in this case were those of change of occupation and duration of injury, it is submitted that this case falls under the repeatedly enunciated rule that all that can be recovered in suits of this character where the policy is not in issue, is the amount due at the time suit is commenced. The appellant alleges that it is an incontrovertible fact that the jurisdictional amount was not involved and that the suit should have been and should be dismissed upon that ground and that the life expectancy of the plaintiff or any similar factor cannot cure this fundamental jurisdictional defect.

It is further submitted that the court was in error in refusing to pass upon the fact of change of plaintiff's occupation and in deciding the case on the basis of alleged violation of Section 7233 of Remington's Revised Statutes of Washington.

In view thereof the appellant respectfully submits that the judgment of the trial court should be reversed and that the action should be dismissed.

Respectfully submitted,

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